HIGH COURT OF UTTARANCHAL AT NAINITAL

Criminal Application No. 09 of 2004

Anusuiya Prasad Dhasmana and other ……. Petitioners

Vs

State of Uttaranchal and others …… Respondents

Dated: 07.01.2004

Hon'ble Rajesh Tandon J.

Heard Shri Rajendra Kotiyal learned counsel for the applications and learned Standing Counsel for the respondents.

By the present writ petition under Section 482 of the Code of Criminal Procedure (for short 'Code') the applicants have prayed for quashing the notice issued under Section 82 of the 'Code' in case no. 2/2003 dated 6.12.2003 under Section 304-B, 498-A IPC and Section 3/4 of the Dowry Prohibition Act issued against the applicants by the Chief Judicial Magistrate, Pauri Garhwal. The petitioners have further prayed that the Chief Judicial Magistrate, Pauri Garhwal may be directed to take the applicants in judicial custody accepting their surrender although they will not be physically able to present themselves in the court and as such prayed was made for surrender in Safdarjang Hospital, New Delhi.

Brief facts giving rise to the present writ petition are that on 1.7.2003 the respondent no.5 lodged a F.I.R. in case no. 2/2003 under Section 304-B, 498-A IPC and Section 3/4 of the Dowry Prohibition Act.

The petitioners has stated that on the basis of the aforesaid F.I.R., the brother of the deponent Sri Chandra Mohan Dhasmana and Nand Kishore Dhasmana were arrested and the bail application of the

co-accused, namely, Chandra Mohan Dhasmana-the husband of the deceased was rejected and another co-accused, namely, Nand Kishore Dhasmana was granted bail on 30.12.2003 by Hon'ble Mr. Justice P.C.Verma, J.

The petitioners have stated that applicant no.1 is 75% handicapped person and he is unable to move anywhere and at present he is admitted in Safdarjung Hospital in the Urology Department and the applicant no.2-the wife of the applicant no.1, is looking after her husband.

For the last three months, the applicant no.1 is in the Safdarjang Hospital and his wife is also with him in order to lookafter him and due to this reason he could not surrender before the court concerned and as such the proceedings under Section 82 of the 'Code' were initiated against the applicants.

In para 7 of the application, it has been mentioned that on 2.1.2004, the Chief Medical Officer has certified that the applicant no.1 is admitted in the Safdarganj Hospital, New Delhi. According to the applicants, they are ready to surrender and furnish adequate security for the satisfaction of the CJM concerned, in case their bail applications are considered.

The applicants have also referred 167 of the 'Code' where the provisions has been made with regard to the arrest and detention in the custody sub-clause (b) of sub-clause 2 of Section 167. In the case of **Smt. Rahmat Jahan Vs. State of U.P. Vol.37 November, 1998 Part-5 page 719,** it has been held as under:

> *"The question that has been posed in this case requires a thorough understanding of the situation in the background. Under the direction of the Supreme Court certain person is required to surrender before the court below. In common parlance surrender would, no doubt, mean appearing*

physically under the jurisdiction of the court awaiting further orders of the court. In the instant case, however, it is a plea of the applicant that she is bed ridden in a hospital due to some hear ailment. She makes a prayer in writing before the court that her being in the hospital be treated as her surrender and she may be taken in judicial custody. This prayer was rejected by the court because of absence of her personal appearance in the court room. 'Surrender' according to the dictionary meaning means 'to yield oneself up'. IN legal parlance it should mean 'succumbing to the physical jurisdiction of the court for action regarding the person who surrenders'. Here is a person, who, for medical reasons, is unable to appear before the court in person, but she desires that her surrender be accepted and she may be taken in judicial custody. It is open for the court to ask the police officers, under a judicial order, to go to the hospital and to take charge of the person. It will be open for the court to see if really the ailment was of such a nature which would require her stay in the hospital or not, but that could be done only after accepting the fact of surrender. The person surrendering although was not physically present before the court has kept herself completely at the mercy of the court awaiting any judicial order for her further custody. We could envisage a case where in an encounter an accused is arrested in a seriously injured condition, in such a case he would be sent to the hospital first rather than to the court and a report to the court would be made explaining the situation and the court would in that case accept the forwarding of the accused to the court. It is certainly an exceptional case, but may not be an absolutely impossible one. Similarly, if a person is critically ill, he or she should have the liberty to be in the

hospital for treatment and then indicate to the court that she or he is succumbing to the jurisdiction of the court and further to indicate that she or he had kept herself or himself under the complete mercy of the court for further orders regarding her or his custody."

In **Niranjan Singh and another Vs. Prabhakar Rajaram Kharote and others (1982 2 Supreme Court Cases page 559),** the Apex Court has held as under:

> *"He can be in custody not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial or other custody. He can be stated to be in judicial custody when he surrenders before the court and submits to its directions."*

In the light of the aforesaid facts, the applicants are at liberty to file an application before the court concerned for surrendering themselves and after considering the circumstances under which the application has been filed, if the CJM finds that person is critically ill. The Judicial Magistrate may pass the appropriate orders considering the 'surrender' in the circumstances and take the applicants in the judicial custody from the hospital itself.

Subject to the aforesaid observations, the writ petition is disposed of. There will be no order as to cost.

Dated 07.1.2004 **(Rajesh Tandon J.)**
Rawat